IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

AMERICAN WASTE MANAGEMENT AND RECYCLING, LLC. Plaintiff, v. CEMEX PUERTO RICO; CANOPY ECOTERRA CORP.; XYZ INSURANCE COMPANIES Defendants.	Civil No. 07-01658-JAF Breach of contract; collection of moneys damages. Jury trial demanded.

CEMEX'S RESPONSE IN OPPOSITION TO "AWMR'S MOTION REGARDING VIOLATION OF COURT ORDER"

TO THE HONORABLE COURT:

Defendant **CEMEX de PUERTO RICO, Inc.** (hereinafter, "CEMEX"), through the undersigned attorneys, respectfully states and prays as follows:

On September 28, 2007, Plaintiff filed a motion informing the Honorable Court of a purported violation by CEMEX of this Court's September 24, 2007 Order. Docket No. 37. Plaintiff's unwarranted motion was filed in bad faith.

1. On August 13, 2007, CEMEX informed the Court of CEMEX's concerns regarding the materials in controversy between AWMR and Canopy Ecoterra, and its corresponding position. See, Docket No. 11. CEMEX certified to this

Court that no dismantling or removal of materials was taking place within CEMEX's premises.

2. However, on September 13, 2007, AWMR filed a motion requesting a "preservation order" and a form for the Court's consideration. Docket No. 28.

3. On Monday, September 24, 2007 this Honorable Court Ordered CEMEX to inmediately cease all dismantling activity at the CEMEX main plant and to prohibit the extraction or exit of any metals from the site. Docket No. 37. CEMEX is currently complying with that part of the Order.

4. Furthermore, this Honorable Court ordered an inspection with video or regular camera of "all CEMEX facilities in Ponce, including but not limited to the so-called 'transport-site' and all floors of the main plant," including "and any and all places where AWMR equipment is or may be located." Docket No. 37, pg. 2.

5. The CEMEX Ponce site has an area of 455.3794 *cuerdas*, with nearly 400 employees, contractors and other parties that enter the site on a daily basis. On a daily basis, Monday through Friday, traffic related to CEMEX's activities in the cement plant reaches 113 cargo trucks with finished products and 134 cargo trucks with raw materials. With these dimensions and traffic, CEMEX has to

carefully coordinate its compliance with the Court Order, in order to avoid unnecessary disruptions to operations and maintain the security of persons and property. Furthermore, CEMEX industrial activities also require safety measures for the protection of processes and commercially sensitive information.

6. Given the aforementioned reasons, CEMEX informed counsel for Plaintiff that it was interested in coordinating the orderly compliance with the Order, on September 26, 2007; only two days after this Honorable Court notified its Order. Specifically, counsel for CEMEX recommended discussing such coordination during the Rule 26(f) conference scheduled for Monday, October 1, 2007.

7. That same day, on September 26, 2007, without advising CEMEX counsel, an agent of AWMR appeared at the CEMEX plant to pick up certain machinery, showing CEMEX management the Court's September 24, 2007 Order. Not being forewarned, CEMEX personnel allowed the removal of two forklifts.[1]

8. Furthermore, *after* CEMEX's request to organize and coordinate compliance with the Order during the R. 26(f) conference to be held in a few days, on Thursday

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[1] For the first time, CEMEX counsel of record has heard that AWMR has a "moving coordinator", although it is not clear who this person is.

September 27, 2007, it sent several agents to the cement plant, unannounced, to request entry for the retrieval of certain machinery.

9. AWMR acted **in bad faith** by sending representatives to the Ponce plant, after receiving CEMEX's request to organize compliance with the Order. *Surely, AWMR could wait three business days until Counsel to all parties met*. As such, AWMR's actions to the contrary are a deliberate attempt to create a **false** and **artificial** controversy.

10. Besides the September 26 and September 27 incidents described above, CEMEX received unannounced visits of other alleged contractors during the remainder of the week. Furthermore, on Saturday, September 29, 2007, Mr. Abul Shah himself appeared unannounced at the plant expecting full access to the facilities, without other parties present.

11. Because the parties were to meet –and did meet on Monday, October 1st, 2007– these events are artificial, and were only executed in bad faith to create the *appearance* of noncompliance on CEMEX's part. As such, AWMR's **insincere** and **frivolous** request for sanctions and can only be explained as a bad faith attempt at provoking and creating needless controversies where none exist.

12. Such an attempt is evidenced by AWMR's misrepresentation of the facts. AWMR **falsely** alleges that CEMEX is a repeat offender. CEMEX did **not** renege on any agreement for removal of equipment or materials in June. Correspondence between the parties and the informative motions before the Court clearly demonstrate that co-defendant, Canopy Ecoterra is currently the only party opposed to the removal of the eight containers with scrap material from CEMEX facilities.

13. For security reasons, to ensure protection of any sensitive information, and to reduce disruptions in plant operations, CEMEX only requested that removal of machinery and equipment be performed reasonably, in the pertinent locations, by clearly identified persons, subject to prior coordination, and in an organized manner. CEMEX will not expose itself to potential liability by being coerced into permitting the removal of equipment or machinery by third parties, *without AWMR's express consent to such third party removal*.

14. Finally, on CEMEX's initiative the parties met yesterday, October 1st to coordinate discovery in the case and to agree upon the manner of compliance with the Court's Order. Although the parties were to inform the Court of the agreements reached during such meeting, *including the*

possibility of reasonably organizing CEMEX's compliance with the Order, AWMR later reneged on the agreements. If CEMEX is unable to immediately reach some kind of agreement regarding the performance of the equipment removal and site inspections, then CEMEX will request reconsideration of the Order.

WHEREFORE, CEMEX Puerto Rico prays this Court to accept this motion as complying with the Honorable Court's Order and deny Plaintiff's Motion alleging noncompliance and requesting sanctions.

I HEREBY CERTIFY that today October 2, 2007, I electronically filed the foregoing with the Clerk of the Court using CM/ECF system which will send notification of such filing to all counsel of record.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 2 October 2007.

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